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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PERRY FREEMAN,

Defendant and Appellant.

A152871

(Contra Costa County  
Super. Ct. No. 51711597)

Perry Freeman appeals from a judgment sentencing him to a so-called split sentence under realignment (two years in custody and two years on supervised release pursuant to Penal Code section 1170, subd. (h)(5))<sup>1</sup> after a jury convicted him of four counts related to his driving of and flight from a stolen car and the court found prior prison enhancements true. He contends: (1) he was denied his right to effective assistance of counsel when the court withdrew a favorable plea offer based on his failure to accept the offer within a period of almost one month; (2) the prosecution did not present substantial evidence that “shaved” keys used to start the stolen car were burglary tools; and (3) the prosecutor committed misconduct in arguing facts not in evidence. We affirm.

I. BACKGROUND

On May 15, 2017, at 5:50 p.m., Pittsburg Police Officer Kingman was on routine patrol in a marked black-and-white car. As he turned onto Linscheid Drive (primarily a

<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

residential area) he saw a black Honda Civic diving towards him at a high rate of speed. He recognized appellant as the driver based on four to five prior police contacts that occurred about one year earlier. Kingman also knew from a police bulletin that appellant had multiple no-bail felony warrants.

Officer Kingman executed a U-turn but lost sight of appellant. Tammae Ross was sitting in her mother's house on Madoline and saw the black Honda Civic speed up and stop at a diagonal in the middle of the road. Appellant jumped out and took off running. Ross walked to the Honda and turned down the radio because of the volume and turned the car's engine off by removing the key from the ignition and putting the set of two keys on the front seat.

Officer Kingman drove by in the direction indicated by Ross and found appellant hiding behind a trash can four or five blocks away. He called dispatch and exited his car, yelling appellant's name. Appellant shouted back, "I have a warrant," which struck Kingman as suspicious. Kingman began chasing appellant, turning on his body camera as he did so, and ultimately arrested him. On the driver's side of the Honda there were two keys that had been "shaved" down: "[Y]ou just shave it down so the ridges are gone so then common cars like Hondas you can stick into the ignition, jiggle it around and it will start." Ross identified appellant as the man who had been driving the car. After being given warnings under *Miranda v. Arizona* (1966) 384 U.S. 436, appellant denied driving the car or recognizing the shaved keys. He claimed to have been walking to a friend's house and to have fled because he knew he had warrants and was scared.

The registered owner of the Honda was Jonathan Borjas, who sold the car to Christian Martinez-Hernandez on about May 1, 2017. On May 13, 2017, two days before appellant was arrested in this case, Martinez-Hernandez parked the car outside his home in Antioch. He had the keys and no one had permission to take the car. On the morning of May 14, the Honda was missing and Martinez-Hernandez filed a report. No officers came to talk to him until after the Honda was recovered.

The district attorney filed an information charging appellant with taking/driving a vehicle without permission with prior auto theft convictions, receiving stolen property,

obstructing a peace officer and possession of burglary tools. (Veh. Code, § 10851, subd. (a); Cal. Pen. Code §§ 666.5, 496d, 466.)<sup>2</sup> Four prior prison terms were alleged under section 667.5, subdivision (d).

Appellant was convicted of the substantive counts after a jury trial and the prison priors were found true in a bifurcated proceeding before the court. At sentencing, the court imposed the three-year middle term for the violation of Vehicle Code section 10851, subdivision (a) plus one year for one of the prison prior enhancements under section 667.5, subdivision (b), for a total of four years, to be served in the county jail under a “split sentence” that included two years of mandatory supervision. (§ 1170, subd. (h)(5).) Time on the receiving stolen property count was stayed under section 654, appellant was given credit for time served on the misdemeanor counts of evading a peace officer and possession of burglary tools under sections 148, subdivision (a)(1) and 466, and the remaining prison priors were stricken.

## II. DISCUSSION

### *A. Ineffective Assistance – Withdrawal of Plea Offer*

Tim Ahearn was appointed as appellant’s counsel in this case. At the arraignment on July 17, 2017, another attorney, Michelle Dawson, appeared for Ahearn on appellant’s behalf and the case was set for trial on August 28, with appellant being ordered back for a readiness conference on August 16. On July 20, 2017, at an unreported conference at which it is unclear who appeared for appellant,<sup>3</sup> the court apparently offered to allow appellant to plead in exchange for a split sentence of one year and one year. Appellant was not personally present.

At the readiness conference on August 16, 2017, attorney Nicholas Billings appeared for Ahearn and requested that the conference be continued until September 22, 2017 (apparently he meant to request August 22, 2017). The court agreed and set the

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<sup>2</sup> A charge of misdemeanor possession of a smoking device under Health and Safety Code section 11364 was subsequently dismissed.

<sup>3</sup> In one minute order on the case, Ahearn is listed as the defense attorney. In another, Dawson is listed as the defense attorney.

matter for August 22, and withdrew its plea offer: “I’m going to withdraw the offer of a year and a year from the court. I don’t know why Mr. Ahearn couldn’t talk to you or his client before then. So I believe that leaves the D.A.’s offer of Count 1 or 2 for three years, 18 months in, 18 months on mandatory supervision.” Billings did not object or indicate that appellant wanted to take the offer, nor did appellant, who was personally present.

On August 22, 2017, Ahearn appeared at the readiness conference and asked the court to allow appellant to accept the court’s offer. “Your Honor, [appellant] had been offered, by the court, a year and a year. He is wishing to resolve his matter for that today. My understanding is last week, when I was not present, that the offer was revoked. I was out of the office last week. But that’s how [appellant] would like to proceed.” The court responded, “Well, frankly the offer was made on July 20th, according to my notes, which gave about a month for you all to fill out a plea form [] . . . and be ready to do that on the 16th. . . . It was definitely a generous get these cases taken care of in a timely manner offer. I don’t know why it couldn’t be done on the 16th. Anybody could have done it with him, and I revoked it.” Ahearn indicated he had been out of the office from July 24, 2017 to August 21, 2017 on vacation, had communicated the offer to appellant before he left, and had requested that the readiness conference be set on a date where he could personally attend.<sup>4</sup>

Appellant argues that he was denied effective assistance of counsel during plea bargaining, a critical stage of the proceedings, because there is no indication Ahearn gave appellant adequate assistance in considering that offer before it was withdrawn, and he had only one working day between the date of the hearing at which the offer was made by the court and the time Ahearn was out of the office on vacation. Ancillary to this argument is the notion that appellant was effectively unrepresented while Ahearn was on

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<sup>4</sup> Dawson, who appeared on Ahearn’s behalf, originally requested that the readiness conference in this case be set on the same date as the readiness conference in another of appellant’s cases, July 20, 2017.

vacation, a situation that was not remedied by Billings's appearance at the readiness conference on August 16, 2017.

“[A] claim of ineffective assistance of counsel in violation of the Sixth Amendment entails deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome.” (*People v. Huggins* (2006) 38 Cal.4th 175, 248, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694.) “The pleading—and plea bargaining—stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions. [Citations.]” (*In re Alvernaz* (1992) 2 Cal.4th 924, 933 (*Alvernaz*)). “[T]he rendering of ineffective assistance by counsel, resulting in a defendant’s decision to reject a plea bargain and proceed to trial, constitutes a constitutional violation which is not remedied by a fair trial.” (*Id* at p. 936.)

With the exception of the day following the hearing at which the plea offer was made, Ahearn’s vacation essentially coincided with the almost month-long period when the plea offer was in effect. We assume appellant did not have access to his named appointed counsel during this period. But the question is, did this deprive him of effective assistance of counsel? Ahearn conveyed the court’s offer before leaving on vacation, and the record contains no details regarding the communications between him and appellant, or appellant and standby counsel, regarding the offer. We do not know from this record whether the failure to accept the offer was due to Ahearn’s unavailability to consult with appellant, or appellant’s own decisionmaking during this period; it may be that appellant, aware of the terms of the offer, decided to reject it and then had second thoughts upon talking to Ahearn after he returned. This claim cannot be resolved on direct appeal. (See *People v. Barella* (1999) 20 Cal.4th 261, 272 [claim of ineffective assistance based on counsel’s failure to advise appellant of limits on conduct credits not cognizable on direct appeal because record did not definitively establish whether defendant would have rejected offer if he had been so advised; claim should be resolved

in habeas proceeding rather than direct appeal]; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 265–266.)<sup>5</sup>

Appellant argues that attorney Billings’s appearance as stand-in counsel at the readiness hearing, at which the plea offer was withdrawn, left him “constructively unrepresented with regard to the proffered plea opportunity” because there is no evidence he had prior knowledge of appellant’s case. We disagree. Appellant relies on *People v. Young* (2017) 17 Cal.App.5th 451, in which the court excused stand-in counsel’s failure to object to the court’s excusal of a juror during deliberations because she did not have prior knowledge of the defendant’s case, “ ‘did not function as the “counsel” contemplated by the constitution’ ” (*id.* at p. 468), and her “presence was tantamount to no representation at all” (*id.* at p. 467). Here, unlike in *Young*, we are not being asked to excuse stand-in counsel’s failure to act at trial, on the record. We also find inapposite *Geders v. United States* (1976) 425 U.S. 80, 87–91, in which the court found the defendant was denied his right to counsel when the trial court issued an order during his cross-examination at trial that forbade him from consulting with his attorney “about anything” during an overnight recess. Plainly, no attorney here was ordered to refrain from advising appellant about the offer. It is not contested that plea bargaining is a critical stage of the proceedings; the question is whether this defendant was denied his right to counsel during that period. Since communications between counsel and appellant, and stand-in counsel and appellant, are not part of the record on direct appeal, the claim must be denied.

The People argue that regardless of the reasons behind appellant’s failure to accept the offer before it was withdrawn, or the court’s withdrawal of the offer, the claim must be denied because the court was not authorized to make the offer of a split sentence of one year and one year in the first place. (See § 1170, subd. (h)(5)(A) & (B).) We agree.

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<sup>5</sup> We note that appellate counsel has framed this issue as one of ineffective assistance of counsel, rather than judicial error. Appellant does not allege the court erred in withdrawing the offer.

In *People v. Clancey* (2013) 56 Cal.4th 562, 572–584 (*Clancey*), the California Supreme Court reiterated the rule that due to the separation of powers doctrine, the court has no authority to substitute itself as the representative of the People and engage in plea bargaining. (See also, *People v. Orin* (1975) 13 Cal.3d 937, 943.) It may, however, “indicate ‘what sentence [it] will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea.’ ” (*Clancey* at p. 570.) We must decide whether the court’s offer was for an unauthorized plea bargain or was simply a permissible indicated sentence.

The trial court in *Clancey*, following off-the-record discussions among the parties, recited the details of the defendant’s plea bargain on the record. The defendant was to plead to the allegations as charged, including an admission to a prior serious felony conviction under the three strikes law. The trial court stated it anticipated that at sentencing, it would grant the defendant’s request pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, to strike the prior serious felony allegation and sentence the defendant to prison for five years. (*Clancey, supra*, 56 Cal.4th at p. 570.) The People objected to the proposed disposition because they believed a reasonable disposition would be a state prison sentence of eight or nine years. (*Id.* at pp. 570–571.) Despite the objection, the trial court obtained the appropriate waivers from the defendant, the parties stipulated to a factual basis for the plea, and the defendant pled no contest to all of the allegations and admitted the prior serious felony allegation. During sentencing as the trial court considered the defendant’s *Romero* request, the People again objected to the proposed disposition of a five-year sentence. The trial court explained that the purpose of the early resolutions calendar was to dispose of cases. (*Id.* at p. 571.) It struck the prior serious felony allegation and sentenced appellant to a prison term of five years. The People appealed. (*Id.* at p. 572.)

The court in *Clancey* proceeded to discuss the doctrine of separation of powers between the courts and the executive branch of government represented by the prosecutor, especially the executive’s prerogative to conduct plea negotiations. (*Clancey, supra*, 56 Cal.4th at pp. 572–575.) Generally, a trial court’s power to make an offer was

subject to the following four constraints: (1) the trial court generally should refrain from announcing an indicated sentence while the parties are still negotiating a potential plea bargain; (2) the trial court should consider whether the existing record concerning the defendant and the defendant's offense or offenses is adequate to make an informed and reasoned judgment as to the appropriate penalty; (3) a court cannot offer any inducement in return for a plea of guilty or nolo contendere, treating the defendant more leniently because he or she forgoes his or her right to trial or more harshly because he or she exercises that right; and (4) the court cannot bargain with a defendant over the sentence to be imposed. (*Id.* at pp. 574–575.)

The *Clancey* court further noted that an indicated sentence is not a promise that a particular sentence will in fact be imposed at sentencing and it does not divest the trial court of its ability to exercise its discretion at the sentencing hearing. (*Clancey, supra*, 56 Cal.4th at p. 576.) Because the record in that case did not clearly indicate whether the sentence represented the trial court's considered judgment as to the appropriate punishment for the defendant, and because the party challenging the disposition objected on the proper basis to the trial court, the proper remedy was a conditional reversal with directions to the trial court on remand to resolve the ambiguities in the record. (*Id.* at p. 578.)

Here, we conclude that unlike *Clancey*, where the record was ambiguous as to whether the disposition proposed by the court was a prohibited plea bargain or a permissible indicated sentence, the record in this case shows an impermissible plea bargain. First, the court stated on the record when it withdrew the offer that “[i]t was definitely a generous get these cases taken care of in a timely manner offer.” Thus, the offer was made to ease court congestion, not because the court believed a year and a year was intrinsically the right sentence given the facts particular to appellant. (See *Clancey, supra* 56 Cal.4th at p. 574.) Indeed, the court withdrew its offer and later imposed a harsher sentence after trial. While not dispositive, this indicates that it did not believe a split sentence of one year and one year to be an appropriate disposition after trial, and made the offer to induce appellant to enter a guilty plea.

Second, although it was possible that appellant would receive the offered sentence if he pled to the face of the pleading, the record is silent as to whether the offer contemplated a plea that encompassed all or merely some of the charges and enhancements. A two-year sentence (one year and one year split) could only be imposed if the court set a low-term sentence on the Vehicle Code section 10851, subdivision (a)/section 666.5 charge, struck all four of the alleged prison priors under section 667.5, subdivision (b), and either stayed the remaining counts or ran them concurrently. This further suggests the offer was made for the purpose of inducing an early resolution of the case, not because the court believed two years was appropriate in light of appellant's history, as does the court's ultimate imposition of a split sentence of two years and two years, which was double the offer. (The sentence is not challenged in this appeal.)

Third, plea negotiations were apparently ongoing, as witnessed by the court's reference to the People's pending offer of three years total, 18 months in custody and 18 months mandatory supervision. "[A] trial court generally should refrain from announcing an indicated sentence while the parties are still negotiating a plea bargain. . . . Absent unusual circumstances [citation], there is little need for a court to articulate its view of the case until the parties are satisfied that further negotiations are unlikely to be productive. Even then, a trial court may prudently refrain unless the court is convinced the punishment proposed by the People is not an appropriate sanction for the particular defendant and the specific offense or offenses." (*Clancey, supra*, 56 Cal.4th 574.)

Finally, while the People did not expressly object on the record, they had no reason to do so as the offer was withdrawn. The People's offer of three years total, 18 months in custody and 18 months mandatory supervision, shows they did not agree with the court's offer of only two-thirds that time.

As the party asserting ineffective assistance of counsel, appellant has the burden of showing error based on the four corners of the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*).) Appellant did not carry this burden. In any event, he is not entitled to the benefits of an unlawful judicial plea bargain that was withdrawn before it was accepted.

### B. *Burglary Tools*

The possession of burglary tools (Count 4) under section 466 was based on appellant's constructive possession of the shaved keys found in the Honda's ignition and placed on the front seat by Tammae Ross. Officer Kingman testified that he learned the term "shaved key" in the police academy and "also on FTO" [presumably field training operations]. They were "used for stolen—stealing cars." "So normal keys have the ridges right here and shaved keys, you just shave it down so the ridges are gone so then common cars like Hondas you can stick into the ignition, jiggle it around and it will start it." Kingman testified that shaved keys were often used to steal older model Hondas, and that both of the shaved keys found in this case successfully started the Honda. Appellant argues this count must be reversed because there was insufficient evidence that the shaved keys could be used to gain entry into a car. We disagree.

Our standard of review on appeal is well-established. "To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)

Penal Code Section 466 provides in relevant part, "Every person having upon him or her or in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code. . . . is guilty of a misdemeanor." The jury in this case was instructed: "The defendant is charged in Count 4 with possessing burglary instruments or tools in violation of Penal Code section 466. [¶] To prove the defendant is guilty of this crime, the People must prove: [¶] 1. Defendant possessed an instrument or tool that could be used to break

into a vehicle; [¶] AND [¶] 2. When the Defendant possessed that tool, he had the intent feloniously to break or enter vehicle.”

Appellant argues that while there was evidence a shaved key could be used to start a car, there was no evidence it could be used to enter a car. We disagree. It is well established that “ “[c]ircumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.” ’ ” ( *People v. Howard* (2010) 51 Cal.4th 15, 34.) Although there is no direct evidence establishing that appellant used the shaved keys to open the car door, there is sufficient circumstantial evidence. Appellant was seen driving the car that was started using one of the two shaved keys. Although the testifying officer discussed the shaved key in the context of the ignition, there is no evidence of damage to the car suggesting entry by means other than the shaved keys. The jury could reasonably assume defendant also used the shaved keys to enter the car without damaging the car. We “must accept logical inferences that the jury might have drawn from the circumstantial evidence.” ( *People v. Maury* (2003) 30 Cal.4th 342, 396.)

Because the jury could reasonably infer that the shaved keys could be and were used to enter the car and thus commit a burglary, we need not decide whether a conviction of possession of burglary tools requires proof that a tool is intended “to break into or gain access to property” rather than any item that may be put to use during the burglary. ( *People v. Diaz* (2012) 207 Cal.App.4th 396, 402, 404.)<sup>6</sup>

### C. Prosecutorial Misconduct

Appellant argues the prosecutor committed prejudicial misconduct by arguing facts not in evidence during closing argument to supply missing evidence. (See *People v.*

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<sup>6</sup> The issue of whether section 466 requires a tool which is intended for use during breaking and entering, and is similar to the items enumerated in the statute, is pending before our Supreme Court. ( *In Re H.W.* (2016) 2 Cal.App.5th 937, review granted Nov. 22, 2016, S237415 [pliers used to remove tags from clothing held by Court of Appeal to be sufficient to violate section 466]; *People v. Shaw* (2017) 18 Cal.App.5th 87, review granted Mar. 14, 2018, S246465 [possession of foil lined bag used to carry items away from burglary held by Court of Appeal not to suffice].)

*Hill* (1998) 17 Cal.4th 800, 823, 827–828, 837 (*Hill*).) We disagree that appellant has shown prejudice on this record.

The standards regarding prosecutorial misconduct are well-established. “ ‘ ‘ ‘ A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ’ ’ ” (*Hill, supra*, 17 Cal.4th at p. 819.)

Prosecutorial misconduct occurs under state law with “ ‘ ‘ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” ’ ’ ’ ” (*Ibid.*) “Error with respect to prosecutorial misconduct is evaluated under the standards enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24, [] to the extent federal constitutional rights were implicated, and under *People v. Watson* (1956) 46 Cal.2d 818, 836[] to the extent state law issues were involved.” (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 514 (*Adanandus*).) “[I]n the absence of prejudice to the fairness of a trial, prosecutor[ial] misconduct will not trigger reversal.” (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Where, as here, a claim of prosecutorial misconduct is based on statements made to the jury, “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) We do not mechanically infer the jury drew the most damaging meaning from the prosecutor’s statements. (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

There are two categories of statements made during closing argument at issue in this case. First, the prosecutor argued facts relating to the use of shaved keys, stating, “You also heard the officer describe how these older Hondas are typically started and entered with shaved keys. Essentially how the key’s shaved down and as long as you can have that smooth surface bumping up against the tumblers of the lock, if you do that enough time[s]—” The defense objected there was no evidence of that and the court responded, “There was no evidence of that but go ahead.” The prosecutor continued,

“You use the shaved keys. The officer did testify that you jiggle a shaved key in the lock and the smooth surface is able to allow you to turn the car on. Same way it’s used to enter the car because it’s the same lock for both of them.” The defense again objected and the court told the prosecutor to go ahead, indicating “[t]he jury’s going to recall what they heard.”

The prosecutor falsely suggested that Officer Kingman had testified that Hondas are entered with shaved keys and that the doors of the Honda were operated by the same key as the ignition in this case. In fact, Kingman’s testimony was focused on how shaved keys can be used to start a car (not access its exterior locks) and there was no evidence the same key could be used to both open and start the Honda in this case. But the court noted there “was no evidence of that,” stated on the record that the jury would recall what it heard, and in its instructions gave CALCRIM No. 222, which provided in relevant part, “Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witness’ answers are evidence.” Defense counsel argued in closing, “The only testimony about these keys that you heard was that they stuck into ignition. Were they able to turn on the ignition? [¶] The officer didn’t bother to try and show that they could open the car door. He didn’t try. He just put it in the ignition but that’s not possession of burglar tools.”

Although the prosecutor committed state law error in stating facts not in evidence, the statements did not render the trial so fundamentally unfair so as to trigger the *Chapman* standard. (See *Adanandus*, *supra*, 157 Cal.App.4th at p. 515.) The remarks of the court and defense counsel convince us the error was harmless because it is not reasonably probable the jury would have reached a different result absent the challenged argument. (*Ibid.*; see *People v. Galloway* (1979) 100 Cal.App.3d 551, 564–565.)

The prosecutor also argued that Tammae Ross had seen appellant “grab[] some stuff” from the car, which supported the prosecution’s theory that appellant grabbed a black hoodie from the car and attempted to disguise his appearance with it. In fact, she had testified she could not tell if appellant was carrying something. This discrepancy

does not require reversal. The evidence of appellant's identity as the driver of the stolen car was otherwise strong, with two eyewitnesses (one of whom knew him previously) identifying him. In light of this, counsel's misstatement did not render the trial fundamentally unfair, and it is not reasonably probable that appellant would have obtained a different result if counsel had refrained from making the argument. (See *Adanandus, supra*, 157 Cal.App.4th at pp. 514–515.) Moreover, appellant forfeited this aspect of his claim by his counsel's failure to object. (*Cunningham, supra*, 25 Cal.4th at p. 1000.)

### III. DISPOSITION

The judgment is affirmed.

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NEEDHAM, J.

We concur.

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JONES, P.J.

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SIMONS, J.

(A152871)